

Federal Communications Commission

DA 95-767

FEDERAL SECTION

APR 17 11:28 AM '95 Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY

MM Docket No. 95-46

In the Matter of

Amendment of Section 73.202(b), RM-8594
Table of Allotments,
FM Broadcast Stations.
(Edenton, Columbia and Pine Knoll)
Shores, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 7, 1995;

Released: April 18, 1995

Comment Date: June 12, 1995

Reply Comment Date: June 27, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Lawrence F. and Margaret A. Loesch ("petitioners") requesting the substitution of Channel 273C1 for Channel 273C2 at Edenton, North Carolina, the reallocation of Channel 273C1 to Columbia, North Carolina, as the community's second local FM service, and the modification of Station WERX-FM's license to specify Columbia as the station's community of license. To accommodate the allotment of Channel 273C1 to Columbia, petitioners also request the substitution of Channel 290A for unoccupied but applied for Channel 272A at Pine Knoll Shores, North Carolina. Petitioners state that they will apply for the channel, if allotted to Columbia.

2. Petitioners contend that their proposal would serve the public interest since it could enable Station WERX-FM to provide 60 dBu service to an additional 28,299 persons, thus providing radio service to 120,177 persons instead of its present 91,878 persons. Columbia, the seat of Tyrrell County, has a 1990 U.S. Census population of 836 persons. It presently receives local transmission service from Station WRSF(FM) on Channel 289C1. Edenton, with a 1990 U.S. Census population of 5,268 persons, would continue to receive local transmission service from Station WBXB(FM), Channel 261C2 and daytime-only AM Station WZBO.

3. Based on the information before us, we are unable to determine whether petitioners' proposal would result in a preferential arrangement of allotments. Petitioners' proposal would not provide a first local transmission service but rather a second such service. Further, while both communities are incorporated and are their respective county's seat, Edenton is substantially larger than Columbia (5,268

persons vs. 836 persons). Thus, the deletion of Channel 273C2 from Edenton would leave the larger community with only one nighttime service. While at this time we do not dispute petitioners' claim that the change of community would enable Station WERX-FM to increase the population it serves by approximately 28,000 persons, we must take into account the fact that an existing service will be deleted from a community. With respect to evaluating proposals to change a station's community of license, the Commission has stated:

"The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating a channel from one community to other."

See *Community of License MO&O*, 5 FCC Rcd at 7097 (1990). Since we are concerned with the loss of transmission service to Edenton, we request that petitioners submit any additional information as to the overall public interest benefits that would be advanced from the grant of this proposal. In addition, we request that the petitioners provide information showing the areas and populations which will receive new service and the areas and population which will lose existing service if Channel 273C1 is reallocated to Columbia. The study should also indicate the number of reception services which are now available with the gain and loss areas.

Technical Summary

4. Channel 273C1 can be allotted to Columbia in compliance with the Commission's minimum distance separation requirements with a site restriction of 24.7 kilometers (15.3 miles) south-southeast to avoid short-spacings to Stations WOLC, Channel 273B, Princess, MD and WHLQ, Channel 273A, Louisburg, NC. Channel 290A can be allotted to Pine Knoll Shores at the transmitter site specified in the pending application of WMBL, Inc. (BPH-920720MA).¹

5. In light of the above, we shall propose to modify Station WERX-FM's license to specify Channel 273C1 as its operating channel and Columbia as its community of license. In accordance with Section 1.420(g) and (i) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioners demonstrate the availability of an additional equivalent channel at Columbia for use by such parties. We will send a copy of this *Notice of Proposed Rule Making* to WMBL, Inc., the applicant for Channel 272A at Pine Knoll Shores. If Channel 290A is ultimately substituted for Channel 272A at Pine Knoll Shores, the applicant will be permitted to amend its application without loss of cut-off protection. However, because it is only an applicant at this time, it is not entitled to any reimbursement.

6. We believe the public interest would be served by seeking comments on the proposed substitution of Channel 273C1 for Channel 273C2 at Edenton, North Carolina, its reallocation to Columbia, North Carolina, and the modification of Station WERX's license accordingly. Therefore,

¹ The coordinates for Channel 273C1 at Columbia are 35-42-48 North Latitude and 76-08-34 West Longitude. The coordinates

for Channel 290A at Pine Knoll Shores are 34-42-38 North Latitude and 76-37-52 West Longitude.

we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

City	Channel No.	
	Present	Proposed
Columbia,		
North Carolina	289C1	289C1, 273C1
Edenton,		
North Carolina	261C2, 273C2	261C2
Pine Knoll Shores,		
North Carolina	272A	290A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **June 12, 1995**, and reply comments on or before **June 27, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark J. Prak, Esq.
Brooks, Pierce, McLendon,
Humphrey & Leonard, L.L.P.
P.O. Box 1800
209 Fayetteville Street Mall
Raleigh, North Carolina 27602
(Counsel to petitioner).

9. IT IS ORDERED, That the Secretary SHALL SEND, BY REGISTERED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making* to the applicant for Channel 272A at Pine Knoll Shores, NC, as follows: WMBL, Inc., 4217 Woodberry Street, University Park, MD 20782.

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Com-

mission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.